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No. 109, Original

IN THE

Supreme Court of the United States

October Term, 1987

STATE OF OKLAHOMA and
STATE OF TEXAS,
Plaintiffs,

v.

STATE OF NEW MEXICO,
Defendant.

NEW MEXICO'S ANSWER

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ANSWER

The State of New Mexico, by its Attorney General, the Honorable Hal Stratton, answers the Complaint filed by the States of Oklahoma and Texas seeking a decree concerning rights and obligations under the Canadian River Compact, Act of May 17, 1952, 66 Stat. 74 ("Compact"), as follows:

1. Paragraph 1 of the Complaint is admitted.

2. Paragraph 2 of the Complaint is admitted.

3. Paragraph 3 of the Complaint is admitted, except that the correct citation for New Mexico's current compilation of the Act of February 7, 1951, is § 72-15-2 N.M. Stat. Ann. 1978 (1985 Repl. Pamph.).

4. In response to Paragraph 4 of the Complaint, New Mexico states that Article I of the Compact speaks for itself as to the principal purposes of the Compact.

5. Paragraph 5 of the Complaint is admitted.

6. In response to Paragraph 6 of the Complaint, New Mexico admits that Article II(d) of the Compact defines the term "conservation storage" in the language stated by Oklahoma and Texas. New Mexico denies, however, that the Compact imposes specific numerical limitations regarding the use of waters of the Canadian River flowing through New Mexico, because New Mexico has free and unrestricted use of all waters of the Canadian River arising in New Mexico, according to Article IV of the Compact. New Mexico also denies that the Compact limits the amount of conservation storage which may be available in New Mexico, because Article IV(b) of the Compact limits only the conservation storage available for impounding the waters of the Canadian River arising below Conchas Dam in New Mexico, and because Article VII of the Compact implicitly permits reservoir capacity in excess of the limit set out in Article IV(b) to allow New Mexico to seek the permission of Oklahoma and Texas for extra conservation storage on a temporary basis.

7. In response to Paragraph 7 of the Complaint, New Mexico admits that the Compact equitably apportions the waters of the Canadian River. New Mexico denies that the Compact imposes an absolute limitation on conservation storage in New Mexico. Article IV(b) of the Compact limits only conservation storage in New Mexico for waters of the Canadian

River arising below Conchas Dam. Furthermore, Article VII of the Compact implicitly allows reservoir capacity in excess of the limit set out in Article IV(b), as explained in Paragraph 6 above. New Mexico also denies that the Compact assures Texas and Oklahoma continuous and dependable quantities of Canadian River flow. New Mexico has free and unrestricted use of all Canadian River flow that arises in New Mexico, except for the limit in Article IV(b) of the Compact on conservation storage available for impounding waters of the Canadian River originating below Conchas Dam in New Mexico, unless permission is obtained to exceed those limits pursuant to Article VII of the Compact.

8. In response to Paragraph 8 of the Complaint, New Mexico admits that twelve reservoirs, including Ute Reservoir, with capacities greater than 100 acre-feet are located within the drainage basin of the Canadian River below Conchas Dam in New Mexico. New Mexico further admits that it and its citizens place substantial dependence on the waters of the Canadian River for irrigation, municipal, industrial, domestic, recreation, and fish and wildlife maintenance purposes in New Mexico. As to all other allegations of the Paragraph, New Mexico lacks sufficient knowledge to affirm or deny the allegations, and therefore denies them. In particular, New Mexico states that the Canadian River, as defined by Article II(a) of the Compact, includes the North Canadian River. Under this definition, about 4.6 million acre-feet of total reservoir storage development has been established on the waters of the Canadian River in the three states. New Mexico denies, however, that reservoir storage capacity is equivalent to conservation storage capacity. The 4.6 million acre-feet of total capacity involves about two hundred sixteen reservoirs constructed on the Canadian River as defined by the Compact, including forty-nine such reservoirs in New Mexico.

9. In response to Paragraph 9 of the Complaint, New Mexico admits that Article IV(b) of the Compact allows New Mexico free and unrestricted use of all waters originating in the Canadian River basin in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impoundment of such waters is limited to an aggregate of two hundred thousand (200,000) acre-feet. New Mexico denies that Article IV(b) of the Compact refers to reservoir storage capacity physically in place below Conchas Dam. Article IV(b) refers to conservation storage capacity in New Mexico available for the storage of water arising in the Canadian River basin below Conchas Dam. New Mexico also denies that the Compact absolutely limits New Mexico's conservation storage of such waters to the amount stated in Article IV(b), because of the provisions of Article VII of the Compact. Article VII of the Compact implicitly allows storage capacity of New Mexico reservoirs in excess of the amount provided in Article IV(b), as explained above at Paragraphs 6 and 7.

Furthermore, Article IV(a) states that New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of the Canadian River above Conchas Dam, with no limitation on conservation storage of such waters. Conservation storage of waters originating in the drainage basin of the Canadian River above Conchas Dam in New Mexico is not limited by the Compact. The same reservoirs that have a limited capacity available for the storage of waters arising below Conchas Dam may have an additional unlimited capacity for the storage of waters arising above Conchas Dam in the Canadian River basin. The place of origin of water, not the place of its storage, controls.

10. In response to Paragraph 10 of the Complaint, the first four sentences of the Paragraph, dealing with the history of Ute Dam and Reservoir, are admitted, except that the initial

stage of the project was completed in 1963. New Mexico denies the remainder of the paragraph. New Mexico denies that any more than 197,700 acre-feet of Ute Reservoir's capacity is available for conservation storage of waters originating below Conchas Dam. New Mexico also denies that the total sediment and dead storage in Ute Reservoir occupy less than 63,990 acre-feet.

11. In response to Paragraph 11 of the Complaint, New Mexico denies that Clayton Lake (wrongly named Clayton Reservoir in the Complaint) contains any conservation storage, because no part of its capacity is available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them. New Mexico also denies that Hittson Creek and Aragon Reservoirs contain any conservation storage, for the same reason. New Mexico states that the other eight listed reservoirs have a total capacity of about 2,260 acre-feet, part of which is occupied by sediment and the remainder of which is accountable as conservation storage under the Compact. The paragraph is otherwise denied.

12. New Mexico denies all allegations of Paragraph 12 of the Complaint. Specifically, New Mexico denies that Ute Reservoir has a conservation storage capacity available for the storage of water arising below Conchas Dam in excess of 197,700 acre-feet, and that other small reservoirs listed in Paragraph 11 of the Complaint have total combined conservation storage capacities in excess of 2,260 acre-feet. The allegation that New Mexico is in violation of the Compact is a legal conclusion which requires no response. New Mexico denies, however, that it violates the Compact, and denies that it violates the Compact by virtue of the capacity of the reservoirs on the Canadian River. New Mexico also denies that it would knowingly and willfully violate the terms of the Compact at all.

13. The first sentence of Paragraph 13 of the Complaint in part states a legal conclusion which to that extent requires no response. New Mexico denies that it has violated the Compact. New Mexico has not prevented Texas from receiving the Canadian River water to which Texas is entitled under the Compact. Other allegations in the paragraph concerning events in Texas are matters about which New Mexico lacks sufficient information to form an opinion, and are therefore denied. New Mexico denies that Texas has been harmed as it alleges.

14. In response to Paragraph 14 of the Complaint, the first sentence in part states a legal conclusion which to that extent requires no response. New Mexico denies that it has violated the Compact. New Mexico has not prevented either Oklahoma or Texas from receiving the Canadian River water to which Oklahoma or Texas is entitled under the Compact. New Mexico admits that the construction of Lake Meredith has caused Canadian River flow into Oklahoma to decline. New Mexico admits that Canadian River flow into Oklahoma declined in the twenty-one year period since 1964, the time Lake Meredith went into operation, from an average of 549 cubic feet per second to an average of 87 cubic feet per second. New Mexico lacks sufficient knowledge to affirm or deny the specific amount of decline, if any, of Canadian River flow into Oklahoma attributable to either Ute Reservoir or Lake Meredith, or both of them, and therefore denies the allegation concerning the same. New Mexico denies that the Compact allows either Oklahoma or Texas a specific amount of Canadian River water. Article IV of the Compact gives New Mexico free and unrestricted use of all water in the Canadian River basin in New Mexico, provided only that New Mexico's conservation storage of water arising in the Canadian River basin below Conchas Dam is limited by Article IV(b), which in turn must be read in *pari materia* with Article VII of the Compact. New Mexico lacks sufficient information to

affirm or deny Oklahoma's plans for future reservoir developments in the Canadian River basin in Oklahoma, and therefore denies the allegations concerning the same. New Mexico denies that its actions have impaired Oklahoma's ability under the Compact to proceed with its planned developments in the Canadian River basin, or have harmed Oklahoma in any other way.

15. The first three sentences of Paragraph 15 of the Complaint are admitted. New Mexico admits that it has refused to acknowledge any violation of the Compact, because no such violation has occurred. New Mexico denies that it refuses to cease its violation of and comply with its duties and obligations under the Compact, because New Mexico has not violated the Compact, nor has it failed to comply with its duties and obligations thereunder.

16. Paragraph 16 of the Complaint is denied. New Mexico denies any and all characterizations of its position made by Texas and Oklahoma. Specifically, New Mexico denies that it has made any excuses for Compact violations because New Mexico has not violated the Compact. New Mexico denies the allegation concerning the purposes of an "intrastate agency contract." New Mexico denies that it has ever asserted that it possesses conservation storage capacity for use in excess of the amounts allowed under the Compact. New Mexico denies that it has the physical capability to construct and maintain unlimited reservoir storage capacity regarding the waters of the Canadian River in New Mexico.

17. The first two sentences of Paragraph 17 of the Complaint in part state legal conclusions as to which a response is to that extent unnecessary. In further response to Paragraph 17, New Mexico denies that it has violated the Compact or harmed Texas and Oklahoma, or either of them. New Mexico denies any plan on its part to create within the Canadian River basin below Conchas Dam, pursuant to the Interstate Stream Commission's

"Notice of Intention To Make Formal Application For Permit," conservation storage facilities in excess of the limit established by Article IV(b). The last three sentences of Paragraph 17 are otherwise admitted.

18. In response to Paragraph 18 of the Complaint, New Mexico states that the said paragraph contains numerous legal conclusions, concerning exhaustion of remedies and similar topics, as to which a response is to that extent unnecessary. New Mexico specifically denies that Texas and Oklahoma have heretofore pursued and found fruitless all possible remedies, other than litigation, to settle the issues raised in the Complaint. New Mexico also denies that it has violated and not complied with the Compact, and that New Mexico has caused any injury to Texas and Oklahoma, or either of them.

AFFIRMATIVE DEFENSES

1. Article VII of the Compact allows New Mexico and Texas to have storage capacity within the Canadian River basin in those two states in excess of the conservation storage limits provided in Articles IV and V of the Compact. Article IV limits certain conservation storage capacity in New Mexico; Article V limits conservation storage in Texas. Subject to certain limitations, Article VII allows each state to be permitted by the Canadian River Commission ("Commission") to impound temporarily more water than the amounts set forth in Articles IV and V, respectively. In New Mexico's case, Article VII clearly contemplates that New Mexico is entitled to have more than two hundred thousand (200,000) acre-feet of conservation storage capacity capable of storing waters originating below Conchas Dam so as to be able to take advantage of temporary Commission permission to impound excess amounts under Article VII.

2. Article IV(a) of the Compact allows the unlimited use of Ute Reservoir for the storage of waters originating in the Canadian River basin above Conchas Dam. Article IV(a) allows New Mexico "free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam." The maximum water storage in Ute Reservoir occurred on May 16, 1987, when the Reservoir spilled. The amount of water in storage, including that in the sediment retention, or desilting, pool, which is not accountable as conservation storage, was 246,600 acre-feet. Of that amount, approximately 180,900 acre-feet originated above Conchas Dam. Water that originated above Conchas Dam reached Ute Reservoir as a result of spills and releases at Conchas Dam which were commenced on February 6, 1987. On April 16, 1987, the date of filing of the Texas and Oklahoma Complaint, the total amount of water in storage in Ute Reservoir, including the water in the desilting pool, was 176,500 acre-feet, of which approximately 71,900 acre-feet originated above Conchas Dam. The Article IV(b) limit on conservation storage of water originating below Conchas Dam has never been approached and cannot reasonably be predicted to be threatened.

3. The Operating Criteria for Ute Reservoir prohibit the conservation storage of water arising below Conchas Dam in excess of 197,700 acre-feet. (The remaining 2,300 acre-feet of New Mexico's conservation storage entitlement under Article IV(b) of the Compact is allocated to smaller reservoirs in the Canadian River drainage basin below Conchas Dam.) New Mexico's compliance with the provisions of Article IV(b) of the Compact is assured by the Operating Criteria, because no reservoir capacity in excess of the limit of Article IV(b) can be available for storage of water arising below Conchas Dam for subsequent release for domestic, municipal, irrigation and industrial purposes, or any of them.

4. The storage capacities of Clayton Lake and Hittson Creek and Aragon Reservoirs do not constitute conservation storage as defined in the Compact, because no portion of the capacities of those reservoirs is factually available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them. These reservoirs are maintained to their maximum controlled capacity of approximately 4,500 acre-feet for recreation, fish and wildlife, and stock watering purposes. No water is available for release from these three reservoirs. A portion of the total capacities of these reservoirs, moreover, is occupied by sediment.

WHEREFORE, New Mexico prays that Oklahoma and Texas take nothing and that their Complaint be dismissed.

Respectfully submitted,

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